Alamo Cement Company, d/b/a Portland Cement Company *and* United Cement, Lime and Gypsum Workers, International Union, AFL-CIO. Cases 23-CA-7770 and 23-CA-7838

June 22, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On May 30, 1980, the Regional Director for Region 23 approved an all-party informal settlement agreement that was, by its terms, to become effective, and compliance therewith by Respondent was to commence immediately, upon the Supreme Court denying application for a writ of certiorari or granting certiorari and sustaining the opinion and the judgment of the Fifth Circuit Court of Appeals in *San Antonio Portland Cement Company*.[1] The Supreme Court denied the writ of certiorari on October 6, 1980, thereby making the settlement agreement, which provided, *inter alia*, that Respondent make whole certain of its employees, effective on said date. A controversy having arisen over the amount of backpay due under the terms of the settlement agreement, the Regional Director for Region 23, on May 19, 1981, issued a backpay specification and notice of hearing alleging the amount of backpay due to the employees under the settlement agreement and notifying Respondent that it must file a timely answer which must comply with the National Labor Relations Board Rules and Regulations, Series 8, as amended.[2] On June 10, 1981, Respondent filed an answer to the backpay specification admitting certain paragraphs, and denying certain other paragraphs by means of a general denial which disputes the accuracy of the formula and the figures used in the computation of gross backpay.

On September 21, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment with exhibits attached. He alleges that, except as to the issue of interim earnings, Respondent's answer failed to comply with the requirements of Section 102.54(b) and (c) of the Board's Rules and Regulations in that it failed to provide any alternative formula or to furnish appropriate supporting figures for computing the amounts owed. Subsequently, on October 2, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On October 2, 1981, Respondent filed a response to the Motion for Summary Judgment wherein it asserts that its answer complies with the Board's Rules. Respondent specifically contends that its answer did offer an alternative formula for computing backpay and that it intends to furnish the Board with appropriate supporting figures as soon as those figures are accurately calculated. It moves that summary judgment should be denied.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.54(b) and (c) of the National Labor Relations Board Rules and Regulations, Series 8, as amended, states:

> (b) *Contents of the answer to specification.*—The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denial shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

[1] 240 NLRB 1168 (1979), enfd. 611 F.2d 1148 (5th Cir. 1980).

[2] The backpay specification duly served on Respondent states that Respondent "shall, within 15 days from the date of the Specification, file with the Regional Director, acting in this matter as an agent of the Board, an original and four (4) copies of an Answer to the Specification. To the extent that any such answer fails to deny allegations of the Specification in the manner required under the Board's Rules and Regulations and the failure to do so is not adequately explained, such allegations shall be deemed to be admitted as true as to the Respondent who fails and that Respondent shall be precluded from introducing any evidence controverting such allegations."

> (c) *Effect of failure to answer or to plead specifically and in detail to the specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

We agree with the General Counsel that Respondent's answer to the backpay specification clearly does not conform to the above requirements as to those compliance matters within its knowledge. Thus, the answer asserts that certain allegations of the backpay specification concerning gross backpay are not correct while failing to set forth an alternative formula or to furnish appropriate supporting figures for computing the amounts owed. Certainly these matters are within the knowledge of Respondent and its failure to deny the specification in the manner required by Section 102.54(b) or to adequately explain its failure to do so requires that such allegations be deemed admitted to be true in accord with Section 102.54(c). Accordingly, the Board finds them to be correct, and grants the General Counsel's Motion for Summary Judgment.[3]

However, the General Counsel does not seek summary judgment with respect to the amounts of interim earnings contained in the specification, and we have held that a general denial of the allegations concerning interim earnings in a backpay specification is sufficient under Section 102.54 to raise an issue warranting a hearing.[4] Therefore, we find the general denials contained in Respondent's answer concerning the amounts of interim earnings, and its general assertion of the employees' failure to seek or accept available employment, to be sufficient under the Board's Rules and Regulations to require a hearing on the general question of interim earnings. However, as stated above, we deem Respondent to have admitted all other allegations in the backpay specification to be true.

ORDER

It is hereby ordered that the General Counsel's Motion for Summary Judgment as to all allegations in the backpay specification except the amounts of interim earnings contained therein be, and it hereby is, granted.

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for Region 23 for the purpose of arranging a hearing before an administrative law judge, limiting such proceeding to the determination of the amounts of interim earnings of the employees involved herein, and that the Regional Director be, and he hereby is, authorized to issue notice thereof.

CHAIRMAN VAN DE WATER, dissenting:

I cannot join my colleagues in granting a partial summary judgment here because of unresolved factual issues raised by Respondent's initial answer to the backpay specification and because such action results in Respondent being denied due process.

While the majority intones the ritual language that Respondent has not complied with the Board's rules, I find Respondent's answer to be more than a general denial and, as noted hereafter, its answer raises factual issues which can only be resolved by a hearing.

As illustrative of the fact that Respondent's answer is more than a general denial; let us examine paragraph 6 of the backpay specification and Respondent's answer.

Paragraph 6 of the specification states in part:

> A. Barrera transferred from the Powerhouse as an oiler making $6.94 per hour, declined the job of Miller Helper at $6.34 per hour, and accepted the job of Dust Truck Driver at $5.98 per hour. On May 10, 1980 Barrera was trans-

[3] Our dissenting colleague contends that Respondent's denial raises factual issues which must be resolved in a hearing. However, he apparently confuses the requirements for an answer to an unfair labor practice complaint with those for an answer to a backpay specification. As previously set forth, Sec. 102.54(b) of the Board's Rules and Regulations states:

> . . . if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, *setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.* [Emphasis supplied.]

Clearly, Respondent has failed to comply with the requirements of the Rules and, therefore, the specifications are deemed to be true. See *Marine Machine Works, Inc., et al.*, 256 NLRB 15 (1981); *Meilman Ford Industries, Inc.*, 255 NLRB 70 (1981) *Standard Materials, Inc.*, 252 NLRB 679 (1980).

Our dissenting colleague's reliance on *Livingston Powdered Metal, Inc.* v. *N.L.R.B.*, 669 F.2d 133 (3d Cir. 1982), is misplaced. There the court found that the Board should have accepted an untimely answer to an unfair labor practice complaint. That decision has no relevance to the instant proceeding which concerns the adequacy of an answer to a backpay specification.

[4] *Dews Construction Corp., a subsidiary of the Aspin Group, Inc.*, 246 NLRB 945 (1979).

ferred to the job of Pack Machine Operator in the Shipping Department at $6.58 per hour.

Part B of paragraph 6 sets out earnings for the three quarters of 1980 and concludes that a total net backpay is due in the amount of $749.16.

Respondent's answer to paragraph 6 is as follows:

> 6. Respondent denies that the arithmetic involved in the computation of the back pay for Agustin Hernandez Barrera is correct, and further denies that Agustin Hernandez Barrera is entitled to recover the amount of backpay described in Paragraph 6. Respondent denies the use of such formula is correct in calculating such back pay of such individual inasmuch as the application of said formula fails to account adequately for such employee voluntarily and on his own initiative assuming a lower job classification at a lower rate of pay, and/or such employee refusing a bona fide offer of employment at a higher rate of pay and other circumstances which render the calculation inaccurate. *Respondent further denies Barrera was in the position of oiler at the powerhouse making $6.94 at the time of its closing.* [Emphasis supplied.]

I do not construe such an answer as a general denial and, in its answer to paragraph 6 of the specification, Respondent denies the correctness of the backpay computation; denies that the use of such backpay formula is correct; and lastly denies that Barrera was in the position of oiler at the time the powerhouse was closed. These are obviously factual issues which must be resolved and are not encompassed within the limited hearing ordered herein.

Similarly, the answer to paragraph 7 of the specification *denies* that Calderon was performing as an oiler at the time of the powerhouse shutdown in January 1980. The specification alleges that Calderon was an oiler. Obviously, another issue of fact which would not be resolved by the limited hearing ordered herein.

Similarly, in paragraph 9 of its answer to the specification, Respondent "*denies* Fred R. Contreras was working as diesel engine operator at the time of the powerhouse closing at $7.34/hour." (Emphasis supplied.) The specification alleges that Contreras "transferred from the Powerhouse as a Diesel Engine Operator." Thus, another issue of fact has been raised by Respondent's answer that will not be resolved in the limited hearing ordered here.

In *Livingston Powdered Metal, Inc.* v. *N.L.R.B.*, in an opinion filed January 25, 1982, denying enforcement of 253 NLRB 577 (1980),[5] the Third Circuit Court of Appeals, in denying enforcement of a summary judgment decision by the Board, noted *inter alia*, "In a summary judgment proceeding, there is no dispute about the relevant facts." In rejecting the Board's conclusion that an answer to the complaint was not timely filed, the court observed: "Nevertheless, there are instances where wooden and unreasoning insistence upon technical procedural rules results, not in the proper disposition of a cause, but in injustice."[6]

Nor does the granting of a partial summary judgment normally serve any useful purpose except to make two cases out of one, especially where questions of fact exist and the formula's applicability is questioned.

I would respectively suggest that the very purpose of hearings is to resolve issues of fact. The majority's granting of a partial summary judgment in these circumstances will not resolve these factual issues and I would, therefore, deny the Motion for Summary Judgment.

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[5] 669 F.2d 133, 136.

[6] *Id.* at 137. In essence my colleagues are stating that it is immaterial that a factual dispute exists if the respondent has not explicitly indicated in its response the *degree* of the factual dispute. Once a factual dispute is established, a hearing is warranted. It is when my colleagues assert that because Respondent has not indicated the degree of factual dispute that they will assume the allegations to be deemed true that a denial of due process occurs. A slavish adherence to the rules in these circumstances is unwarranted.